In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 972.

THEODORE C. McBRIDE,

Petitioner,

vs.

THE TOLEDO TERMINAL RAILROAD COMPANY,

Respondent.

PETITION OF RESPONDENT FOR REHEARING.

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TABLE OF AUTHORITIES.

Cases.

Text.

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Pursuant to the provisions of Rule 58 of the Revised Rules of this Court, the respondent, The Toledo Terminal Railroad Company, petitions this Court for a rehearing of the decision and judgment entered in the above case on June 24, 1957 for the reasons stated below.

I.

In this case, the respondent has been denied its day in court on the merits. Although this Court has insisted that "once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case" (*Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500, 509), it granted the petition for certiorari and, without a hearing on the merits, summarily reversed the judgment of the Ohio Supreme Court, *McBride vs. Toledo Terminal Rd. Co.*, 166 Ohio St. 129, 140 N. E. 2d 319.

If, as indicated in the *Rogers* opinion, this proposition applies to the members of the Court who oppose any particular petition for certiorari, it should apply with equal force to those who favor granting certiorari.

As directed by Rule 24 of the Revised Rules of this Court, respondent's brief was confined to opposing and resisting the granting of the petition for writ of certiorari. It did not and could not properly have attempted to cover the merits of the issues raised on appeal.

The respondent has not been accorded "the same measure of review on the merits as in every other case."

II.

The short per curiam opinion of this Court indicates that the basis of its reversal of the judgment of the Ohio Supreme Court was its former opinion in *Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500. However, there are clear and controlling differences in these two cases. This would have been clearly shown had the respondent been given an opportunity by this Court to be heard on the merits.

a. The distinctions—factual and legal—between the *Rogers* case and the instant McBride case are emphasized by the fact that one member of this Court, Mr. Justice Burton, concurred in the result in *Rogers*, but dissented in the case at bar. This is a clear indication that one member of the Court agrees that the two cases are unlike.

b. The facts of the Rogers and McBride accidents are different. Rogers was injured while standing, as his work required, in a constricted area along a railroad track. A train was passing and he was attempting, in accordance with instructions, to observe the journals of the passing

train. The situation which brought about his stepping and falling was the sudden and unexpected spreading of the smoke and flames from burning brush. He had never before experienced this type of incident.

On the other hand, McBride's claims are based upon the extremely simple incident and normal operation of climbing down the ladder of a boxcar. He had climbed up and down the ladders of many cars, including the ladder on which the mishap occurred, earlier in the night's work. (R. 74, 75, 101, 103, 105, 110, 111.) Shortly before the mishap, he had "swung onto" this boxcar ladder as the car was moving past him. (R. 104, 112.) He was standing on the stirrup of this ladder when that car was coupled onto standing cars by impact. (R. 104.) Next, he climbed to the top of the ladder, released the brake, gave a "back-up signal," and remained on the ladder as this move was started. (R. 107.) It was as he was climbing down this ladder that he claimed that his foot slipped "on the ice." (R. 73, 76.)

c. The claims of negligence in the two cases are entirely different. In the *Rogers* case, the petitioner claimed negligence in that he was required to work "in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger." (pages 502-503.) McBride's claim of negligence was that the respondent "knowingly caused and permitted the plaintiff to work in a place and under conditions that were unsafe * * * in each of the following particulars" (1) ice on ladder rungs on railroad cars, (2) insufficient lighting and (3) footwear insufficient for traction. (R. 3.) These claims are far removed from those of the *Rogers* case.

d. The jury verdicts in these two cases were different, in nature, from each other. In the *Rogers* case the jury returned a general verdict finding all issues in favor of the petitioner. In the McBride case, the jury's general verdict is explained by its answers to interrogatories. The jury found (1) that the respondent was negligent in only one of the respects alleged in the petition, "insufficient lighting," and (2) that the petitioner was guilty of contributory negligence to the extent of 40%. (R. 250-251.) The first of these answers constituted, in legal effect, a finding for the respondent on the issues of ice and footwear. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.*, 147 Ohio St. 293, 298, 70 N. E. 2d 898.

The jury based its award for the petitioner on the finding of "insufficient lighting." The evidentiary support for the jury's action was more limited after it returned its verdict than before. The issues had been submitted to the jury on three grounds of negligence. The verdict was based on only one.

e. In the McBride case, petitioner's testimonial admissions determined the decision of the Ohio Supreme Court. These admissions must be conclusive upon the petitioner. *Kansas Transport Co. vs. Browning*, 219 F. 2d 890, 893; *Winkler vs. City of Columbus*, 149 Ohio St. 39, 77 N. E. 2d 461; 32 *C. J. S.* 1110, Section 1040. No such binding admissions affected the decision of the Missouri Supreme Court in the *Rogers* case.

The petitioner admitted without qualification that as he was climbing down the boxcar ladder, *he was not able to see* the rungs below him and *could not* and *did not look at them.* (R. 119, 121.) These admissions were control-

ling. In the same manner that this Court relied upon "common experience" in the *Rogers* case (page 503), the Ohio Supreme Court recognized the "common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up and down. * * * It is inconceivable that artificial lighting would even be a factor causing his foot to slip."

McBride's admissions are substantially similar to those relied upon by this Court in the case of *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518, in sustaining a directed verdict for the defendant railroad company.

f. The legal questions in these two cases are different. In the *Rogers* case, the question was (page 506) "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." It was necessary to apply this legal test to all the evidence in the record, because no interrogatories had been submitted.

In the McBride case, after the return of the verdict and the answers to interrogatories, the only legal question was whether the petitioner's testimonial admissions that there was no proximate causal relationship could be disregarded by the jury. The Ohio Supreme Court concluded that there was no evidence connecting "insufficient lighting" with the accident.

III.

If "once certiorari is granted" this Court is "to afford the litigants the same measure of review on the merits as in every other case," the respondent should, in all fairness, be entitled, on briefs and oral argument, with appropriate reference to the record, to present its case to this Court on the merits.

This petition for rehearing should be granted.

Respectfully submitted,

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Of Counsel:

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CERTIFICATE.

I, Robert B. Gosline, one of the attorneys for The Toledo Terminal Railroad Co., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented to the Court in good faith and not for any purpose of delay.

ROBERT B. GOSLINE,
240 Huron Street, Toledo, Ohio,
Attorney for Respondent.